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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re A.Y., a Person Coming Under the
Juvenile Court Law.

B213514

(Los Angeles County
Super. Ct. No. CK70358)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

D.T.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Terry T. Truong, Juvenile Court Referee. Affirmed.

Nancy O. Flores, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond Fortner, County Counsel, James M. Owens, Assistant County Counsel, and Melinda S. White-Svec, Deputy County Counsel, for Plaintiff and Respondent.

Mother D.T. appeals from an order granting sole physical custody of her son, A.Y., to his father, J.Y. Mother contends the juvenile court applied the wrong legal standard when making the custody determination and abused its discretion by granting sole physical custody to father. We find no reversible error and affirm the juvenile court's order.

FACTUAL AND PROCEDURAL SUMMARY

Five-year-old A.Y. came to the attention of the Los Angeles County Department of Children and Family Services (DCFS) on October 10, 2007, when a caller to the child protection hotline reported that A.Y. was a victim of emotional abuse and general neglect by his mother and was at substantial risk of physical abuse by his brother. Upon investigation, DCFS learned that on October 9, 2007, A.Y. was present during the arrest of his 16-year-old half-brother, J.M., on suspicion of murder and robbery.¹ Mother's husband of about a year had been arrested a few days earlier in connection with the same crime. Mother and father shared joint legal and physical custody of A.Y. pursuant to a court order, but A.Y. primarily resided with his mother, mother's husband, and J.M.²

A social worker spoke to father, mother, A.Y., and a paternal aunt on October 10. Father reported that mother had taken A.Y. with her to work on the morning of October 9, but returned home during the day in order for J.M. to supervise A.Y. Father stated that when mother and A.Y. arrived at home, they witnessed J.M.'s arrest. Mother denied to the social worker that A.Y. had seen the arrest or that she had intended to leave A.Y. in J.M.'s care on the day of the arrest, but admitted that J.M. sometimes babysat A.Y. She denied knowledge of any aggression by J.M. toward A.Y.

When A.Y. saw a police officer accompanying the social worker, he began crying and refused to speak in the officer's presence. He told the social worker, "[T]he police

¹ J.M. is the child of mother, but not father.

² According to the jurisdiction report prepared by DCFS in November 2007, mother's husband remained incarcerated and mother intended to file for divorce. Whether she did so is not clear from the record. Little mention is made of mother's husband, but by January 2009, mother apparently lived only with an adult daughter.

came to the house and tore everything apart,” and “[T]here were lots of police. They were pointing guns at my brother. My brother was on the ground.” He also said that his mother had been planning to leave him with J.M. when she took him home on the day of the arrest. A.Y.’s lip appeared red and raw, and he bit his lip when he talked about J.M.’s arrest.

Paternal aunt reported that she saw marks and bruises on A.Y.’s arms and back, which A.Y. said were from J.M. She also reported that mother was a heavy drinker. Other neighbors reported ongoing domestic violence in mother’s home, including screaming, cursing, and throwing objects.

Mother denied domestic violence and drug use, but admitted drinking beer. She accused father of smoking marijuana. Father admitted past drug use, but stated that he had completed a rehab program three or four years earlier. He stated that mother also had used drugs in the past, though he did not know if she was a current user. He further stated that mother had a history of heavy drinking, which led to fights and police intervention.

DCFS took A.Y. into protective custody, releasing him to father. The next day, father called the social worker to report that he discovered bruises on A.Y.’s arms and a scab on his back when bathing A.Y. A.Y. refused to tell father how he received the injuries. Father had concerns in the past about J.M.’s treatment of A.Y., but mother did not take them seriously. Because A.Y. was having problems at school and throwing temper tantrums, father had enrolled him in counseling at school. The social worker arranged for a physical examination of A.Y. after father reported his injuries. When the social worker asked A.Y. how he got the bruises, he denied knowing. When asked about J.M., A.Y. said, “[H]e does things to me and I don’t like it. I tell my mom, but he does it again,” and “He hurts me.” DCFS records showed prior referrals alleging abuse by J.M. against A.Y. The most recent was an April 2007 report alleging J.M. tied A.Y.’s arms behind his back, causing A.Y. to fall and suffer rug burns.

At the detention hearing held on October 15, 2007, the juvenile court declared J.Y. the presumed father of A.Y., found a prima facie case for detaining A.Y. from mother,

and ordered A.Y. released to father. On January 16, 2008, the juvenile court accepted the parties' mediated agreement. Father voluntarily submitted to the jurisdiction of the juvenile court. The court sustained the amended allegations under Welfare and Institutions Code section 300, subdivisions (a) and (b),³ finding that mother had failed to protect A.Y. from physical abuse by J.M., of which she knew or reasonably should have known, and that mother made inappropriate plans for the care of A.Y. in that, on numerous occasions, she left him in the care of J.M., whom she knew or reasonably should have known was physically abusing him. The court dismissed allegations as to substance abuse by both mother and father. Family reunification services and monitored visitation were ordered for mother, as were family maintenance services for father.

The juvenile court conducted a six-month review hearing July 14, 2008. The status review report prepared by DCFS showed both parents were in compliance with the court's orders. Mother completed a parenting class, individual counseling, and an outpatient substance abuse program and submitted numerous drug tests, all of which were clean. Father also completed a parenting class and submitted clean drug tests. DCFS reported A.Y.'s placement with father and visitation with mother were going well, and it requested "that it be given discretion to walk the matter on for a Home of Parent order as to mother." The juvenile court granted DCFS discretion to liberalize visitation to include overnight weekend visits, stated that DCFS would have to seek a court order in order to return A.Y. to mother's home, and continued the matter for a 12-month review.

At the 12-month review hearing, held December 9, 2008, DCFS recommended that the juvenile court terminate jurisdiction with an order granting mother and father joint legal custody, with father retaining primary physical custody and mother continuing overnight weekend visits. Mother argued that she should be granted joint physical custody on the basis of her compliance with the case plan and the public policy favoring frequent contact between parents and their children. Mother also pointed out that the impetus for the dependency proceeding was abuse by a sibling and that the sibling was

³ All unspecified statutory references are to the Welfare and Institutions Code.

incarcerated and unlikely to return home soon, as he was facing murder charges. Counsel for A.Y. argued that father should have sole physical custody under the best interests of the child standard. The court stated that it would set the matter for a contested section 364 hearing.

The contested hearing was held January 15, 2009. After hearing argument from all parties, the juvenile court terminated jurisdiction with a custody order granting father sole physical custody of A.Y. and granting mother and father joint legal custody. (We discuss the January 15 hearing in greater detail below.)

Mother filed this timely appeal as to the physical custody order.

DISCUSSION

I

Mother contends the trial court applied the wrong legal standard and abused its discretion when it decided to grant sole physical custody of A.Y. to father. According to mother, the trial court erred by proceeding under section 364 rather than section 361.2, and consequently failed to consider her home for placement. We agree that the court proceeded under the wrong standard, but conclude the error was harmless.

Section 361.2 provides, in relevant part: “(a) When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child. [¶] (b) If the court places the child with that parent it may do any of the following: [¶] (1) Order that the parent become legal and physical custodian of the child. . . . The court shall then terminate its jurisdiction over the child. . . . [¶] (2) Order that the parent assume custody subject to the jurisdiction of the juvenile court and require that a home visit be conducted within three months. . . . [¶] (3) Order that the parent assume custody subject to the supervision of the juvenile court. In that case the court may order that reunification

services be provided to the parent or guardian from whom the child is being removed, or the court may order that services be provided solely to the parent who is assuming physical custody in order to allow that parent to retain later custody without court supervision, or that services be provided to both parents, in which case the court shall determine, at review hearings held pursuant to Section 366, which parent, if either, shall have custody of the child.”

In contrast, section 364 provides for a child to come under court supervision *without* removal of the child from the physical custody of his or her parent or guardian. Section 364 does not apply when the juvenile court removes a child from the physical custody of one parent and places the child with a different, previously noncustodial parent. (*In re Nicholas H.* (2003) 112 Cal.App.4th 251, 263-264 (*Nicholas H.*)).

In the present case, the juvenile court removed A.Y. from the physical custody of mother, and placed him with father, with whom A.Y. had not previously resided. The authority for such an order is found in section 361.2, subdivision (a). The juvenile court then chose the third option available under section 361.2, subdivision (b), placing father under the jurisdiction of the court and ordering services for both parents. Because the court proceeded under section 361.2, subdivision (b)(3), it was under an “express statutory directive” to hold section 366 review hearings. (*Nicholas H., supra*, 112 Cal.App.4th at p. 264.)

The procedures set forth in section 366 et seq., which by their terms directly apply only to children in foster care, are not amenable to rigid application when a child is placed with a parent. (*Nicholas H., supra*, 112 Cal.App.4th at pp. 264-265.) Under sections 366.21, subdivisions (e) and (f), and 366.22, subdivision (a), the dispositive question at the six, twelve, and eighteen month review hearings is whether removing a child from foster care and returning the child to the physical custody of a parent or guardian would create a substantial risk of detriment to the child’s health, safety, or well-being. (*Id.* at p. 266.) “However, when a dependent child has been placed with a previously noncustodial parent [pursuant to section 361.2] and both parents have been provided services, several considerations preclude applying the risk of detriment analysis

in the same way it applies in a foster care case. First, . . . the child has already been placed with *a parent*. Second, the determination has already been made, pursuant to section 361.2, subdivision (a), that a supervised placement with that parent would not be ‘detrimental to the safety, protection, or physical or emotional well-being of the child.’ And third, by extending services to both parents, the court has necessarily identified two distinct potential parental homes for this child, the home of removal and the home of the previously noncustodial parent.” (*Id.* at pp. 266-267.)

Consequently, once the juvenile court determines that the home of removal no longer poses a substantial risk of detriment to the child, return to that home does not necessarily follow. Instead, the court must determine whether the previously noncustodial parent could assume custody without supervision. (*Nicholas H.*, *supra*, 112 Cal.App.4th at p. 267; see also § 366.21, subd. (e).) If so, then both parents are qualified to receive custody of the child, and the court must determine “which parent, if either, shall have custody of the child.” (§ 361.2, subd. (b)(3); *Nicholas H.*, *supra*, at p. 267.) The basis of this determination is the best interests of the child. (*Nicholas H.*, *supra*, at p. 268.)

Unlike section 366 hearings following temporary placement with a noncustodial parent, section 364 review hearings do not involve an inquiry into which of the potential parental placements would be in the best interests of the child. Because section 364 applies when the child remains in the home of the custodial parent, the dispositive question at a section 364 review hearing is whether conditions still exist, or are likely to exist absent supervision, which would justify the initial assumption of jurisdiction under section 300. (§ 364, subd. (c); see also *In re Janee W.* (2006) 140 Cal.App.4th 1444, 1451.)

In the present case, the juvenile court incorrectly referred to the January 15, 2009 hearing regarding custody and termination of jurisdiction as a section 364 review hearing. Even so, we may affirm the court’s order if the record shows that the decision was based on the best interest of the child. (See *In re Janee W.*, *supra*, 140 Cal.App.4th at p. 1452 [affirming order erroneously made pursuant to section 364 rather than section 361.2,

because evidence supported implicit finding under correct standard]; see also *In re Athena P.* (2002) 103 Cal.App.4th 617, 627 [noting that harmless error principles apply to dependency proceedings, pursuant to article VI, section 13 of the California Constitution].)

Despite the erroneous label applied to the hearing and the absence of the phrase “best interests of the child” from the court’s ruling, the record shows that A.Y.’s best interest was the focus of the parties and the court at the January 15 hearing. Counsel for mother, father, A.Y., and DCFS all appear to have proceeded on the assumption that either parental home would be suitable and that the dispositive issue was the custodial arrangement most beneficial to A.Y. No argument was made that giving mother custody of A.Y. would place the minor at substantial risk of detriment, or that mother was not qualified to care for him. Instead, counsel focused on the potential impact on A.Y. of the various custody options.

Mother, through counsel, argued that joint physical custody was in the best interest of the child because A.Y. had expressed a desire to spend more time with her. Mother pointed out that she and father lived next door to one another, and argued that as long as she was restricted to seeing A.Y. on weekends, “he’s got to go home every night and take a look at the house next door where he said he wants to spend more time and he’s not able to.”

Father, through counsel, opened his argument by saying, “I do think that it’s very important to look in this case at the best interest of the child.” Father argued that he offered A.Y. a stable home, and asserted that A.Y.’s anxiety, acting out, and aggressive behaviors had decreased during his placement with father. Father asserted that splitting physical custody of A.Y. was impractical because he was beginning to attend school, and stated that he planned to relocate to Santa Monica to secure A.Y.’s eligibility to attend a particular school there.

Counsel for A.Y. favored sole physical custody with father because of the positive effect his placement there had on A.Y.’s anxiety and aggression. Counsel also reported that A.Y. had expressed that he liked the existing arrangement. DCFS agreed that A.Y.’s

behavior and mental health issues had improved during his placement with father, and recommended that father be granted sole physical custody because of the stability he had afforded A.Y. DCFS submitted to the court a letter from A.Y.’s therapist, who had seen A.Y. once a week for over a year. According to the letter, “[A.Y.] was originally referred . . . for aggressive behavior in class and anxiety. [A.Y.]’s progress since counseling at [agency] and living with his father [J.Y.] has been very positive with no further aggression at school and vastly decreased anxiety. [A.Y.] is a very warm, loving and bright six-year old boy who is doing very well in his current situation.” The therapist noted that she had not met or spoken with mother, and she declined to make a custody recommendation in accordance with her agency’s policy.

The juvenile court granted sole physical custody to father and joint legal custody to mother and father. The court explained, “I am basing this on the arguments raised by [counsel for A.Y.]. I agree with her 100 percent that while the parents may reside near each other now, [A.Y.] is at an age where his education is truly starting. He is six years old, and I do not want him to have to go one week on, one week off, especially if the parents, or one of the parents need to move away, and that would affect his education.”⁴

Though the court made its finding in the language of section 364—“conditions which would justify the initial assumption of jurisdiction are not likely to exist if supervision is withdrawn”—the specific circumstances to which the court referred as the basis for its decision are those associated with the best interest standard. (See, e.g., *In re Angel B.* (2002) 97 Cal.App.4th 454, 464 [stability and continuity of care]; *In re John W.* 41 Cal.App.4th 961, 974 [avoidance of requiring child to oscillate between households during school year].) On this record, we are satisfied that the juvenile court correctly

⁴ Mother argues, “[T]here is no rule that dictates parents sharing joint custody have to have custody every other week.” In fact, it was mother’s attorney who suggested such an arrangement at the January 15 hearing: “I think it’s definitely in the best interest of this child to have joint legal, joint physical. And if the court needs to make it a week on, week off, whatever, so that the child is able to spend that time. [sic]” The court’s adoption of counsel’s phrasing does not suggest that the court was unaware of the rules governing joint custody.

based its decision on the best interests of A.Y., despite framing its ruling in the language of section 364. (See *Nicholas H.*, *supra*, 112 Cal.App.4th at p. 268.)

II

Mother also contends the trial court abused its discretion by granting sole legal custody to father. The juvenile court's custody order "should not be disturbed on appeal unless an abuse of discretion is clearly established." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Id.* at pp. 318-319.)

When determining which of two potential parental placements is in the best interest of the child, "the court is not restrained by 'any preferences or presumptions.'" [Citation.] Thus, for example, a finding that neither parent poses any danger to the child does not mean that both are equally entitled to half custody, since joint physical custody may not be in the child's best interests for a variety of reasons. [Citation.] By the same token, a finding that the parent from whom custody was removed no longer poses a risk of detriment or that the parent whose custody has been subject to supervision no longer requires supervision is relevant to, but not necessarily determinative of, the best interests of the child." (*Nicholas H.*, *supra*, 112 Cal.App.4th at p. 268.)

As we have discussed, the juvenile court considered appropriate factors when determining which parental home would be in A.Y.'s best interest. Mother's brief highlights her commendable performance during the reunification period, her affectionate relationship with A.Y., and her commitment to providing a safe and appropriate home for A.Y. Yet we do not perceive the custody order as suggesting that mother lacks positive attributes as a parent. Rather, it appears A.Y. is fortunate to have two parents who are willing and able to care for him, but that the court concluded a stable home with one parent—father—would be in his best interests. Given evidence of A.Y.'s decreased anxiety and aggression following his placement with father, the court's decision was not arbitrary or unreasonable. Likewise, the court considered and rejected the suggestion of

joint custody, concluding that A.Y.'s education would suffer if he had to move back and forth between households at the very time he was beginning to attend school. This conclusion also is within the bounds of reason.

DISPOSITION

The order granting sole physical custody of A.Y. to father is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.